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No. 81-2380

In the Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS J. PENNAVARIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was deprived of a fair trial by the inclusion of an instruction on recklessness in the court's charge on the specific intent requirement of 18 U.S.C. 1005.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 7

TABLE OF AUTHORITIES

Cases:

Andresen v. *Maryland*, 427 U.S. 463 4

Barnes v. *United States*, 412 U.S. 837 4

Benton v. *Maryland*, 395 U.S. 784 4

United States v. *Brien*, 617 F. 2d 299, cert. denied, 446 U.S. 919 5

United States v. *Frady*, No. 80-1595 (Apr. 5, 1982) 5

United States v. *Krepps*, 605 F. 2d 101 4

United States v. *Natelli*, 527 F. 2d 311, cert. denied, 425 U.S. 934 5

United States v. *Park*, 421 U.S. 658 5

United States v. *Schoenhut*, 576 F. 2d 1010 4

United States v. *Stevison*, 471 F. 2d 143 4

United States v. *Welliver*, 601 F. 2d 203 5

United States v. *Wilson*, 500 F. 2d 715, cert. denied, 420 U.S. 977 4

Page

Statutes and regulation:

18 U.S.C. 2 6
18 U.S.C. 215 2
18 U.S.C. 656 ..... 1, 2, 4
18 U.S.C. 1005 ..... 1, 2, 3, 4, 6
28 C.F.R. 2.20 4

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1982 (Pet. App. A-2). A petition for rehearing was denied on April 23, 1982. The petition for a writ of certiorari was filed on June 28, 1982, and is untimely under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on 15 counts of misapplication of bank funds, in violation of 18 U.S.C. 656, and 68 counts of making false entries in bank records, in violation of 18 U.S.C. 1005. He

was sentenced to concurrent terms of five years' imprisonment on all counts.[1] The court of appeals affirmed in an unpublished judgment order (Pet. App. A-1 to A-2).

The evidence at trial established that petitioner, assistant manager and loan officer at the Citizen's National Bank in Monroeville, Pennsylvania, was responsible for processing personal and consumer loans. Processing included taking the applications, handling the credit checks, and closing the loans, up to his credit limit of $10,000 (Gov't Br. 4).[2] Over the course of approximately 10 months petitioner approved 24 loans to four individuals. In each instance petitioner received a share of the face amount of the loans. For example, one borrower obtained six bank loans totalling $75,000, and petitioner received $10,000 of the loan proceeds (Gov't Br. 6); another obtained six banks loans totalling $35,000, and kicked back $5,000 to petitioner (Gov't Br. 5). The purposes of the loans were falsely stated on several of the loan applications (Gov't Br. 4, 5). For example, one borrower received two loans to pay off gambling debts, but the applications stated legitimate business purposes. In other instances, the loans were made payable to knowing or unwitting "nominees" (Gov't Br. 5, 6) and, in the case of the latter, their signatures on the applications were forged (*ibid.*). Petitioner knew of the forgeries and misstatements about the real recipients of the loans, and he additionally participated in some of the falsifications by putting background information on the applications (Gov't Br. 5). In

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[1] After the jury was unable to reach a verdict on 15 counts charging violations of 18 U.S.C. 215, 656, and 1005, the court declared a mistrial as to those counts. Petitioner has not yet been retried on those counts.

[2] "Gov't Br." refers to the government's brief in the court of appeals. The extensive transcript in this case, consisting of over 20 volumes, was not available in the preparation of this response. The above statement was therefore derived from the appellate brief and consists of largely undisputed factual matters.

his defense, petitioner testified that he had no knowledge of and did not participate in the borrowers' false statements. He further testified that he did not intend to defraud the bank (Pet. 3).

In its final charge, with respect to the counts alleging false entries in the bank's records (18 U.S.C. 1005), the court instructed the jury (Tr. 2859-2861):

> There are three essential elements that the Government must prove beyond a reasonable doubt to establish a violation of 18 United States Code 1005 * * *. [T]he Government has to prove that the defendant knowingly made or caused to be made a false entry concerning a material fact in a book or record of the bank as charged; and * * * the Government must prove that the defendant made or caused to be made such entry willfully and with knowledge of its falsity with the intent to deceive. * * * Such intent may be inferred from the facts and circumstances shown at trial and is basically a question of fact for you the jury. Moreover, reckless disregard of the interests of the bank is equivalent to intent to injure or defraud. * * * A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that considering the nature and intent of the actor's conduct, that is the defendant's conduct, and the circumstances known to him its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the defendant's situation.

ARGUMENT

Petitioner contends (Pet. 3-6) that the trial court's instruction on recklessness permitted him to be convicted of

the Section 1005 counts even if the jury did not find that he had a specific intent to injure or defraud the bank. This argument was properly rejected by the court below.

Initially, we note that petitioner's concurrent five-year sentences on the Section 1005 counts are also concurrent to the sentences he received on the Section 656 counts, which he does not challenge. This is a singularly appropriate case in which to decline to review petitioner's claim under the concurrent sentence doctrine. *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976); *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *Benton* v. *Maryland*, 395 U.S. 784, 787-791 (1969). Each false statement count corresponds to one of the fraud counts charged under Section 656, and petitioner's concurrent conviction under the former will not subject him to additional collateral consequences.[3]

In any event, petitioner's argument proceeds on a misapprehension of law. It is in fact generally agreed that " '[r]eckless disregard of the interests of the bank is equivalent to intent to injure or defraud' " in prosecutions under both 18 U.S.C. 656 and 1005. *United States* v. *Krepps*, 605 F. 2d 101, 104, 108 (3d Cir. 1979); *United States* v. *Schoenhut*, 576 F. 2d 1010, 1024 (3d Cir. 1978); *United States* v. *Wilson*, 500 F. 2d 715, 720 (5th Cir. 1974), cert. denied, 420 U.S. 977 (1975); *United States* v. *Stevison*, 471 F. 2d 143, 145 (7th Cir. 1972). Thus, the court's intent

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[3]Under the Adult Guidelines for Parole Decisionmaking, 28 C.F.R. 2.20, petitioner's fraud would be classified as a High Severity Offense. There is no possibility that petitioner's Section 1005 convictions would place petitioner in a higher category or subject him to delay in his parole eligibility. Nor would the unreviewed counts measurably add to the impeachment effect of the unchallenged fraud counts, or result in his being subject to possible enhanced penalties in the event that he commits further crimes in the future.

instruction did not permit the jury to convict petitioner under an erroneous standard of culpability.[4]

Finally, the instructions, when viewed as a whole (*United States* v. *Frady*, No. 80-1595 (Apr. 5, 1982), slip op. 17; *United States* v. *Park*, 421 U.S. 658, 674 (1975)), plainly and sufficiently charged the jury on the need to find that petitioner acted with specific intent to injure or defraud the

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[4]Petitioner's reliance on *United States* v. *Welliver*, 601 F. 2d 203 (5th Cir. 1979), is inapt. The court of appeals in that case reversed the appellant's conviction because the district court had limited its instructions to "a vague generalization equating recklessness with intent to defraud" (*id.* at 210). The court of appeals noted that "[w]hen a trial judge in his instructions refers to 'recklessness,' no more is necessarily implied than such mere negligence, carelessness, thoughtlessness, or inadvertence as could not be regarded as the equivalent of an intentional wrong" (*id.* at 210). Reversal was mandated because the instruction did not contain "a definition of 'recklessness' requiring * * * more than mere negligence, carelessness, thoughtlessness, or inadvertence" and because the court did not instruct the jury that it need not find intent to defraud from the defendant's reckless conduct (*ibid.*).

In distinct contrast to the instruction in *Welliver*, the court here charged that recklessness meant a "conscious[] disregard [of] a substantial and unjustifiable risk" (Tr. 2861)—a standard clearly requiring conduct more egregious than mere negligence, carelessness, thoughtlessness, or inadvertence. The court further charged the jury that it could not "find [petitioner] guilty of any count where the evidence establishes no more than negligence. Negligence is the basis for civil liability only. * * * Negligence is the absence of due care under all the circumstances but negligence is also the absence of criminal intent or the absence of an evil state of mind. A person cannot be convicted of a crime if his conduct amounted only to negligence or the failure to exercise due care or proper judgment under all the circumstances" (Tr. 2866-2867). This thorough instruction eliminated the possibility that petitioner could have been convicted on the basis of his "bad banking practice" (Pet. 6) unless there was an intent to defraud or injure the bank. See *United States* v. *Brien*, 617 F. 2d 299, 312 (1st Cir.), cert. denied, 446 U.S. 919 (1980) (a " 'conscious avoidance' standard implies a specific intent to avoid the proscription of the law"); *United States* v. *Natelli*, 527 F. 2d 311, 322-324 (2d Cir. 1975), cert. denied, 425 U.S. 934 (1976).

bank. The court's instructions on Section 1005 included the following admonition (Tr. 2862):

> [It] does not matter whether the bank sustained a loss. What is important is what [petitioner] intended. [Petitioner] could be guilty even if the bank has suffered no loss if he had the intent to injure or defraud. By the same token, even if the bank sustained a loss in a given transaction, [petitioner] could be innocent if he had no intent to injure or defraud in connection with the transaction.

Later, when explaining accomplice liability under 18 U.S.C. 2, the court charged that "[p]articipation is willful if done voluntarily and intentionally and with the specific intent to fail to do something which the law forbids or with a specific intent to do something the law requires to be done, that is to say with bad purpose to either disobey or disregard the law" (Tr. 2866). The court restated this instruction when, in the context of all of the charged offenses, it defined the terms "knowingly" and "willfully" (Tr. 2867). There, the court stressed that petitioner must have acted "voluntarily and purposely with the specific intent to do something that the law forbids, that is to say, with bad purpose either to disobey or disregard the law" (Tr. 2868). Thus, the charge as a whole sufficiently instructed the jury on specific intent as an element of the Section 1005 offense.[5]

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[5]Because the instruction as a whole required the jury to find the specific intent alleged in the indictment before it could convict petitioner, petitioner's suggestion (Pet. 5-6) that his conviction was based upon a theory at material variance with the indictment is without support.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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